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UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Working Group on International Contract Practice
Twenty-ninth session
Vienna, 5 - 16 October 1998

PROPOSAL BY THE UNITED STATES OF AMERICA

Note by the Secretariat

1. At its twenty-eighth session, the Working Group considered, in the context of its discussion on draft article 18 dealing with the debtor's discharge by payment, the relationship between the notification and the payment instructions. At that session, the view was expressed that a clear distinction should be drawn between the notification of the assignment and the payment instructions (A/CN.9/447, para. 74). While some support was expressed in favour of that view, the Working Group adopted the substance of draft articles 16 and 18 without drawing such a distinction (A/CN.9/447, paras. 75-78).

2. Following the twenty-eighth session of the Working Group, the Secretariat received from the delegation of the United States of America a proposal for a revision of draft articles 5, 16 and 18. The proposal is intended to give an opportunity to the Working Group to reconsider its decision with regard to draft articles 16 and 18. The text of that proposal is reproduced in the annex to this note as it was received by the Secretariat.

ANNEX

Discharge of the Debtor by Payment
Proposed Revision of Articles 5, 16, and 18

Article 5. Definitions and Rules of Interpretation

(f) "Notification of assignment" means a writing sent by the assignor or the assignee indicating that an assignment has taken place, identifying the assignee, and reasonably describing the receivables assigned.

(g) "Payment instruction" means a writing sent by the assignor or the assignee reasonably describing the receivables to which it applies and an address or account to which payment is to be made.

Article 16. Notification of the debtor

(1) Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor a notification of assignment and a payment instruction not at variance with article 7(2).

(2) A notification of assignment or payment instruction sent in breach of any agreement described in paragraph (1) is not ineffective for purposes of Article 18 by reason of such breach, but nothing in this article affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.

Article 18. Debtor's discharge by payment

(1) Subject to paragraphs (2) to (4), the debtor is discharged by paying in accordance with a payment instruction

(a) received from the assignor either (i) before the debtor receives a notification of assignment, or (ii) accompanying a notification of assignment if that notification is sent by the assignor;

(b) received from the assignee either (i) after the debtor receives a notification of assignment, or (ii) accompanying a notification of assignment if that notification is sent by the assignee

to the same extent as it would be discharged by paying the same amount to the assignor if there were no assignment.

(2) If the debtor receives more than one notification of assignment relating to an assignment of the same receivables by the same assignor, "notification of assignment," as used in paragraph (1), refers to the first such notification of assignment received.

(3) If the debtor receives a notification of assignment from the assignee, the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment has been made and, unless the assignee does so, the debtor is discharged by paying the assignor. Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.

(4) This article does not affect the discharge of the debtor by payment to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund.

Remarks

1. The purpose of this proposal is to effectuate the view expressed at the twenty-eighth session of the Working Group that a clear distinction should be drawn between the notification of the assignment and the payment instructions. The distinction is important because of the wide variety of transactions involving assignment of receivables. In some cases, no notification of assignment is given at all. In other cases, notification of assignment is given to the debtor, but the debtor is not instructed to pay anyone other than the assignor; in such cases, an instruction to pay the assignee may be given later. In still other cases, the debtor is simultaneously notified of the assignment and instructed to pay the assignee. Articles 16 and 18 should provide clear rules for all such cases. In light of the theme of debtor protection that runs through the draft convention, the rules governing the debtor's right to discharge should reflect the likely understanding of the debtor of the communications it receives regarding assignment of the receivable.

2. To effectuate this view, the proposal distinguishes between "notification of assignment" and "payment instruction," defining both terms in Article 5. The remainder of the proposal follows the structure of WP.96. Article 16 provides rules governing the right, as between the assignor and the assignee, to send a notification of assignment or payment instruction and the effect as between those parties of breach of any agreement with respect to such notification or instruction. Article 18, on the other hand, provides rules for determining the circumstances under which the debtor may be discharged by payment to the assignor or assignee.

3. Article 18 reflects the view that it is a payment instruction, rather than a notification of assignment, that brings about a change in the actions that will entitle the debtor to discharge. Even if the debtor has received a notification of assignment the debtor is entitled to discharge by paying the assignor as if there were no assignment until it receives a payment instruction from the appropriate party. Article 18 provides that the appropriate party to send a payment instruction is the assignor until the debtor receives a notification of assignment and is the assignee thereafter; in addition, either the assignor or assignee may send a payment instruction accompanying a notification of assignment.

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